**T – Aim of Punishment**

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## GIANT BIBLIOGRAPHY

#### All of these authors agree with the aim of punishment view

Otterstrom 07 [GÖRAN DUUS-OTTERSTRÖM. Punishment and Personal Responsibility. DEPARTMENT OF POLITICAL SCIENCE. GÖTEBORG UNIVERSITY. 2007. <http://www.utbildning.gu.se/digitalAssets/1316/1316460_avhandling_gdo.pdf>. AJ]

Rachels 97 [Punishment and Desert. James Rachels. [This essay originally appeared in Ethics in Practice, edited by Hugh LaFollette (Oxford: Basil Blackwell, 1997), pp. 470-479.] AJ]

Donald A. Dripps 03 [James Annenberg Levee Professor of Law and Criminal Procedure, University of Minnesota Law School. “Fundamental Retribution Error: Criminal Justice and the Social Psychology of Blame.” VANDERBILT LAW REVIEW. Vol. 56. 2003]

Michael Cahill 07 [Retributive Justice in the Real World. Washington University Law Review, Vol. 85, p. 815, 2007; Brooklyn Law School Legal Studies Paper No. 77. DT.]

Leo Zaibert 06 [“Punishment And Retribution (Law, Justice and Power).” Ashgate Publishing Company. March 2006. [Philosophy Professor at the University of Wisconsin-Parkside]. DT.]

Rawls 55 [John Rawls. “Two Concepts of Rules.” Page 4-5. The Philosophical Review, Vol. 64, No. 1 (Jan., 1955), pp. 3-32. Duke University Press on behalf of Philosophical Review. <http://www.jstor.org/stable/2182230>. AJ]

Ballard 09 [Jeffrey Brand-Ballard. Department of Philosophy, George Washington University. “INNOCENTS LOST: Proportional Sentencing and the Paradox of Collateral Damage.” Legal Theory, 15 (2009), 67–105. Printed in the United States of America ⃝C 2009 Cambridge University Press. AJ]

Binder and Smith 2000 [Guyora Binder \* and Nicholas J. Smith\*\*. \* Professor of Law, State University of New York at Buffalo. \*\* Law Clerk, Judge Nygaard, U.S.C.A. 3rd Cir.; J.D., Buffalo; Ph.D., Vanderbilt. “FRAMED: UTILITARIANISM AND PUNISHMENT OF THE INNOCENT.” Rutgers Law Journal¶ Fall, 2000. 32 Rutgers L. J. 115. AJ]

McCloskey 57 [H. J. McCloskey. “An Examination of Restricted Utilitarianism.” The Philosophical Review. Vol. 66, No. 4, Oct., 1957. Pages 466-485. JSTOR. <http://www.jstor.org.libproxy.usc.edu/stable/2182745>. AJ.]

Bradley 03 [Bradley, Gerard V. RETRIBUTION: THE CENTRAL AIM OF PUNISHMENT. Harvard Journal of Law and Public Policy 27. 1 (Fall 2003): 19-31. <http://search.proquest.com.libproxy.usc.edu/docview/235188882#center>. AJ.]

McNeill 13 [Fergus McNeill. Professor of Criminology & Social Work, University of Glasgow. “When Punishment is Rehabilitation.” Submitted to: G. Bruinsma and Weisburd, D. (eds.)(forthcoming) The Springer Encyclopedia of Criminology and Criminal Justice. Springer. <http://blogs.iriss.org.uk/discoveringdesistance/files/2012/06/McNeill-When-PisR.pdf>. AJ]

Hajidin 07 [Mane Hajdin, Santa Clara University. Dialogue / Volume 46 / Issue 02 / March 2007 pp 402-404. Deirdre Golash. The case against punishment: Retribution, crime prevention, and the law. New York: New York University Press, 2005. <http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=5453712>. AJ]

Raynor and Robinson 09[Peter Raynor Professor of Criminology and Criminal Justice Swansea University. Gwen Robinson Senior Lecturer in Criminal Justice Sheffield University. "WHY HELP OFFENDERS? ARGUMENTS FOR REHABILITATION AS A PENAL STRATEGY." European Journal of Probation University of Bucharest www.ejprob.ro Vol. 1, No. 1, 2009, pp 3 – 20. <http://www.ejprob.ro/uploads_ro/677/PRGR.pdf.AJ>]

Scheid 97 [Scheid, Don E. “Constructing a Theory of Punishment, Desert, and the Distribution of Punishments.” 10 Can. J. L. & Jurisprudence 441 (1997). AJ]

Hart 59 [H. L. A. Hart. “The Presidential Address: Prolegomenon to the Principles of Punishment.” Proceedings of the Aristotelian Society. New Series, Vol. 60, (1959 - 1960), pp. 1-26. <http://www.jstor.org/stable/4544619>. AJ]

## GENERIC INTERP + VIOLATION

#### Interpretation:

#### Rehab and retribution are separate paradigms of punishment that make claims about why we ought to punish offenders, not the content of those punishments. Both theories of punishment may have some disagreement, but they both tend to coalesce around different ideas for the offender.

Otterstrom 07 [GÖRAN DUUS-OTTERSTRÖM. Punishment and Personal Responsibility. DEPARTMENT OF POLITICAL SCIENCE. GÖTEBORG UNIVERSITY. 2007. <http://www.utbildning.gu.se/digitalAssets/1316/1316460_avhandling_gdo.pdf>. AJ]

Rehabilitation is simply the idea that the penal practice should aim at changing the factors that caused the crime in the first place. Unlike deterrence, which seeks to achieve the right behaviour without address- ing the basic criminal motivation, rehabilitation seeks to change the offender’s very desire or need to commit crime Hudson. offers the follow- ing definition:¶ “Taking away the desire to offend, is the aim of reformist or rehabilitative punishment. The objective of reform or rehabilitation is to reintegrate the offender into society after a period of punishment, and to de- sign the punishment so as to achieve this” (cited in Raynor & Robinson 2005: 4).¶ The mode of rehabilitation can take different forms depending on what factor is believed to have caused the criminal to break the rules. If lack of education and consequent inability to compete at the job-market is be- lieved to be the cause, rehabilitation consists in providing the offender with an education. If a mental disorder is seen as the cause, the state should provide psychiatric treatment or psychotherapy. If addiction is believed to be the cause, the offender should get help overcoming his or her addiction. And so forth.¶ As we saw in the previous chapter, rehabilitation urges us to be cautious about the way we use the term “punishment”. Punishment can be defined as an authority’s intentional infliction of pain or deprivation on a person for having broken a rule. We saw that rehabilitation too might involve the intentional infliction of pain and deprivation, but that in treatment-modes of rehabilitation, the intention to inflict pain or dep- rivation is dropped. What sets rehabilitation apart from most other theories of punishment is its straightforwardly paternalistic element.86 Whereas punishment is typically understood as something that makes the punished worse off then they would otherwise have been (i.e. as something which harms them), rehabilitation is usually conceived as good for the person undergoing it. In being helped to overcome the disorders that breed crime, the criminal is believed to be restored to a better state.87¶ Having said that, some rehabilitationalists could defend punishment as we know it on the ground that it leads to the improvement of the of- fender: that by being subjected to pain or deprivation, the offender sees the errors of his or her ways and becomes a better person. Such was the idea of traditional reform theory (Foucault 1995). Modern rehabilitation- alists, however, tend to regard the idea of improving rule breakers by punishing them as far-fetched (Honderich 2006). They lean more towards treatment as defined in chapter 2. Unless otherwise stated, this is also what I shall intend by rehabilitation in the remainder of this book: Reha- bilitation theory is the view that the penal regime should aim at treating offenders.¶ Now, just as the modes of rehabilitation can differ, so can the nature of its justification. The standard justification is perhaps straightforwardly utilitarian: by rehabilitating offenders we reduce crime, which benefits society. Rehabilitation is justified, a utilitarian could argue, since it is the best way to maximize utility (Duff 2004). But other justifications have been advanced. Some argue that rehabilitation is the right of an offender. Since an offender needs rehabilitation in order to overcome his or her problems, offering rehabilitation is a humanitarian obligation; a way of giving an offender the best tools available to lead a good life. Such a jus- tification can be disconnected from considerations of social utility - it could be argued that we owe offenders rehabilitation even if there are, from a utilitarian point of view, better ways of promoting utility. Others still have defended rehabilitation on the ground that it is the best way of protecting the interests of potential crime victims. Since rehabilitation is the most effective means of protecting potential crime victims, to reha- bilitate is an obligation we have towards them, some have argued (Raynor & Robinson 2005).

#### He continues:

Despite retributivism’s contested nature, there are some commonalities between most versions of the theory. A classical definition, which I think most of its proponents would accept, is found in Johan Rawls’s Two Concepts of Rules. Rawls here offers the following description:¶ “[..] the retributive view is that [that] punishment is justified on the grounds that wrongdoing merits punishment. It is morally fitting that [and] a person who does wrong should suffer in proportion to his wrongdoing. That a criminal should be punished follows from his guilt, and the severity of the appropriate punishment depends on the depravity of his act. The state of affairs where a wrongdoer suffers punishment is morally bet- ter than the state of affairs where he does not...” (Rawls 2001: 21-2) Now, a number of things are noteworthy in this passage. Punishment, first of all, is said to be somehow intrinsically justified when adminis- tered to those who deserve it. It is “morally fitting” to punish a person who has done wrong. This “fittingness” is normally understood as a mat- ter of justice. When Rawls’s writes “that the state of affairs where a wrongdoer gets punished is morally better than the state of affairs where he does not”, he expresses the retributive belief that is just to punish those who deserve it (and that it is less just, or unjust, to refrain from doing it). A second thing to note is [and] that punishment is required to be “in proportion” to the wrong. Retributivism claims that when one does wrong, one should get a punishment that is somehow commensurate to “the depravity of the act” (whatever this might mean). It rejects excessive leniency and harshness in punishment alike: in order for the punishment to be justified, it must be proportional to the offence. It must be what the offender deserves.

#### Prefer the evidence:

#### This evidence is from a widely cited book on different theories of punishment, so it involves a comprehensive examination of topical views rather than a brief background before the author makes their own point.

#### He summarizes the overlap in the literature, rather than the difference, so Otterstrom best captures what is most reasonable in terms of topical division.

#### Otterstrom isn’t taking a position, and instead is presenting the views as the proponents would, meaning my evidence has little chance of misinterpreting or skewing facts.

#### Violation

#### [Policies]: The aff defends specific correctional policies and claims I have to defend status quo harsh policies like “get tough on crime,” but those are about specific policies rather than aims of punishment.

#### Standards

## STANDARD – TOPIC LIT

#### Over 50 years of topic literature and hundreds of articles support my view. Discussions of policies beg the question of what aims guide those policies to begin with – any discussion of values would collapse back to the aims view.

Barbara Hudson 03 [Professor at the Lancashire Law School. Understanding Justice: An introduction to Ideas, Perspectives and Controversies in Modern Penal Theory. 2003]

The perspectives on punishment mentioned so far have all been highly theoretical. Jurisprudence and the philosophical tradition[s] are concerned with the ought of punishment - what ought to be the goals of punishment, what ought to be the values embodied in and upheld by the criminal law - and little will be encountered by way of discussion of the actual practices of punishment. The sociological perspective is concerned with the is of punishment - what punishment really is for, what the true nature of modern penal systems is - again, this is description at a highly abstracted and theorized level. Such sociological description often claims to be revealing the `deeper structures' of penal systems (Cohen 1984), and although actual policies and practices may be referred to, they b are offered as examples, chosen to illustrate the analyst's general characterization of the penal systems under examination. In other words, in reading writers such as Melossi, Cohen or Foucault, one finds references to certain sorts of punishment, which they see as representative of the defining developments in modes of punishment of particular stages of social development; one does not find a full, descriptive account of penal institutions, policies and practices. There is another stream of penology which is much less abstract, and has more pragmatic aims. As philosophical [theory] penology sets itself the task of showing what punishment should be for, and as sociology sets itself the task of revealing what punishment really is like, the criminological tradition sets itself the apparently more modest task of suggesting punishment strategies to match the [these other] goals set by others, he they philosophers or, more usually, legislators. This is `technicist penology', as opposed to the `social analysis of penality' (Garland and Young 1983), which is simply aimed at helping those with the power to punish to put their ideas into practice. Technicist penology is a principal strand of so-called administrative or mainstream criminology (Cohen 1981; Young 1988). Administrative or technicist penology and criminology accept[s], rather than question[s], the aims of punishment espoused by [of] the state. The problems they seek to resolve are second-order questions such as what type of prison regime will serve the needs of reform, or public protection, or [such as] retribution; how prisons can he managed so as to minimize disorder and maximize security; what kind of non-custodial penalties will satisfy the penal aims of protection, retribution and rehabilitation. They also address themselves to the values which law is supposed to encompass, such as fairness and consistency, but the focus is on whether the correct legal processes are followed, and they pay little attention to the outcomes of criminal justice and penal processes.

#### Topic lit is important:

#### It controls scholarly real-world discussion, meaning I access real-world education and quality of debates. Making up new meanings of topics for the sake of fairness won’t yield nearly as many high-quality rounds as allowing us to access the extensive literature. *[This is also key to deep education since topic lit uniquely allows for deep exploration of issues rather than shallow prep-based discussions.]*

#### It most fairly divides ground by creating a universally accessible basis for pre-round prep. The topic is the only thing debaters know and have access to, so random interpretations are unreasonable.

## STANDARD – DIVISION OF GROUND

#### Assigning any other meaning to the topic creates unstable ground for both sides since there’s no real basis for deciding who gets what ground. Prefer my evidence since it directly compares the two views of the topic in the lit, so my evidence shows how the literature approaches these two views rather than authors just asserting aims or policies.

#### *This is especially true since the death penalty and other harsh policies are not the same as retributivism – both doctrines could justify the same policies, so assigning policies makes no sense.*

*Leo Zaibert in 2006 “Punishment And Retribution (Law, Justice and Power).” Ashgate Publishing Company. March 2006. [Philosophy Professor at the University of Wisconsin-Parkside]. DT.*

*I would like to continue the discussion of the misinterpretations of retributivism by¶ addressing one of the most dangerous and pervasive mischaracterizations of¶ retributivism. Retributivism is frequently [dangerously] confused, inside and outside academia,¶ with an endorsement of lex talionis, that is, with the view encapsulated in the¶ slogan an eye for an eye. a tooth for a tooth. One unwelcome manifestation of this¶ confusion is, for example, the widespread but false belief that retributivists¶ perforce must endorse the death penalty for murderers. But, as Moore points out,¶ this is rather gratuitous, and indeed baseless. To claim both that someone should¶ only be punished if she deserves it, and that if she deserves to be punished then she¶ should be punished, is in no way to say how much she deserves to suffer. As Moore would have it, retributivists “are not committed to any particular penalty scheme nor¶ to any particular penalty as being deserved”." This amalgam of retributivism and lex¶ talionis is perhaps Kant’s most pernicious legacy, from which Moore sensibly distances himself. 26 And, as [a] Moore continues, “separate argument is needed to answer these ‘how much’ and ‘what type’ questions [which lax talionis seeks to¶ answer], after one has described why one is punishing at all”.” A retributivist might¶ endorse lex talionis (just as utilitarians might), but she need not endorse it.¶*

*The tendency to equate retributivism with lex talionis is in fact but one¶ offshoot of a more comprehensive worry: that retributivism is too harsh.” The way¶ in which this particular manifestation of the comprehensive worry plays out is clear¶ enough: lex talionis is allegedly very harsh, and by equating it with retributivism,¶ the conclusion that retributivism is very harsh is easy to generate. There is plenty¶ of evidence of the fact that lex talionis was never meant to be interpreted or applied¶ literally; or as Kleinig puts it “it is difﬁcult to ﬁnd "proponents of a lax talionis doctrine who have taken it literally". 29 It is rather obvious, in any event, that there¶ exist many cases in which lax talionis simply cannot be applied literally.”¶ Moreover, lex talionis encapsulates, simultaneously, a lower and an upper limit to¶ what can be justifiable by way of punishment. Lax talionis thus cuts both ways, and¶ to that extent it is not easy to assert that it is necessarily, always unduly harsh.¶*

*While lex talionis can be seen in a charitable light, that is, as an incipient (albeit clumsy) attempt to say that there must be proportionality between the harm and the punishment (you cannot take an eye when the harm amounted merely to a tooth, and so on), it is obvious that such a view is different from retributivism. Retributivism does not say anything about what constitutes a proportional punishment for any given instance of wrongdoing. Rather than defending lex talionis, and in spite of its obvious differences with retributivism, I would like to discuss the underlying worry regarding retributivism being too harsh.*

*Retributivism has been equated, or considered to be the cause, or considered to be closely linked, to all sorts of “harsh” political agendas, such as “tough-on-crime”, “two strikes and you are out”, “law and order”, penalizing recidivist criminals more severely than non-recidivist criminals, and so on, which seek to¶ over-criminalize and to over-punish." “When you play the game of criminal justice¶ on the ﬁeld of retribution", Braithwaite and Pettit tell us, “you play it on the home¶ ground of conservative law-and-order politicians”; and they continue “you give full¶ rein to those who play to the sense of normality of the majority, urging them to¶ tyrannize the minority”? But as is the case regarding the alleged, though entirely¶ unargued for, theoretical proximity between lex talionis and retributivism, these¶ political agendas are not necessarily related to retributivism (as a philosophical¶ doctrine) either. A retributivist might endorse some of these views, though she might not, no more than would a consequentialist thinker. These sorts of views with which retributivism is frequently confused, are in fact, easily shown not to be retributive at¶ all. It is precisely the fact that the deﬁnitions of retributivism presented at the outset¶ are so straightforward which staves off this mistaken amalgamation of retributivism,¶ as a philosophical doctrine, with these political agendas.¶*

#### *Prefer my evidence since it’s directly comparative between the two paradigms within the criminal justice system so the internal links are tighter. Topic literature so it best frames terms of art in the resolution to place limits on what ground each side can get.*

#### Division of ground matters:

#### It’s key to fairness since denying debaters stable ground determines all other fairness considerations like strategic decisions and pre-round prep. You can’t do any of these if you don’t know what your ground is, so my interpretation is necessary for any debate.

#### Quality of debates plummet if we can’t substantively engage in a stable way, so I control the internal link to clash and quality of ground.

## VIOLATION – FELONS

#### Felon disenfranchisement is part of the social contract theory. It is inconsistent with utilitarianism or retribution.

Johnson-Paris 03 [Afi S. Johnson – Parris. “Felon Disenfranchisement: The Unconscionable Social Contract Breached.” http://archive.fairvote.org/righttovote/scb.pdf. AJ. Jstor. Virginia law review, vol 89 no 1 mar 2003. AJ]

The barrier to full, active citizenship for the unincarcerated felon¶ is the result of segregation imposed through the civil disability of¶ disenfranchisement. Though disenfranchisement is administratively¶ a product of civil statutes, it is in effect penal—a collateral consequence of criminal sanctions. Courts, however, have used a “pur-¶ pose” standard to explain why disenfranchisement is nonpenal,¶ noting that “[because] the purpose of [the statute disenfranchising¶ the convicted felon] is to designate a reasonable ground of eligibil-¶ ity for voting, [the] law is sustained as a nonpenal exercise of the¶ power to regulate the franchise!” There is a connection, nonethe-¶ less, between penal theory and many of the policy justifications¶ given for felon disenfranchisemcnt The application of this disability, however, is out of step with the traditional punishment theories¶ of utilitarianism and retribution.‘ In addition to preserving the “pu-¶ rity of the ballot box," popular modern policy arguments for felon¶ disenfranchisement include protecting against voter fraud and preventing felons from voting to alter the criminal law.’ Felon disen-¶ franchisement has also withstood the scrutiny of courts against¶ statutory and constitutional challenges." Theoretical justifications for disenfranchisement posit that the felon has broken the social contract through his actions, and that he does not have the moral competence to participate in governing a society. This note will focus on felon disenfranchisement under ocial contract theory and argue that the relaiance on this theory is misplaced.

# \*\*FRONTLINES FOR THEORY\*\*

## T BEFORE THEORY

#### Prefer limits arguments derived from the topic literature over generic theory arguments like turn ground.

#### And,

#### Topicality determines theory arguments like division of ground or education, so those beg the question of whether it’s legitimate ground or whether we’re educating ourselves about the right thing. For instance, the most fair division might say rehab is presumption, but that actively mis-educates us and damages the activity.

#### Switch side debate solves any disadvantage in terms of fairness or education since we get an equal number of aff and neg rounds, so debating the topic comes first.

#### You shouldn’t punish me for how the topic is worded since debaters have no control of the selection and are forced to debate what is chosen.

## A2 REAL WORLD EDUCATION

#### Topic literature controls the internal link since it contextualizes the real-world discussion and consensus on these issues. If our “real world” education denies scholarly interpretations in the real-world, the education we get is actively bad since it gives us the wrong information.

#### Prefer philosophical education since we can get policy education from other sources but LD is a unique source for philosophical comparisons. Also, philosophy education is principally through debate, whereas education about policies can happen from just reading or classes.

## A2 ACCESSIBLE LIT/OTHER LIT ARGUMENTS

#### These arguments beg the question of what is RELEVANT lit to begin with. Health care lit might be super-cool, but it has nothing to do with the topic so there’s no link.

## A2 GROUND (DA, CP, ETC)

#### This begs the question of whether you have this ground to begin with, which collapses to a T question.

#### There’s no need for this ground since the AC can’t turn any NC that is desert-based – both aff and neg would function as syllogisms, so my structure is still reciprocal.

#### Arbitrarily assigning ground to correct for some prep skew is worse for predictable pre-round burdens since it makes it impossible to decide when the topic starts and ends, so it’s better for them to suffer some marginal ground loss.

## A2 IMPLEMENTATION

#### Retributivism does not focus on implementation.

Michael Cahill. Retributive Justice in the Real World. Washington University Law Review, Vol. 85, p. 815, 2007; Brooklyn Law School Legal Studies Paper No. 77. pp 817-818. DT. “Utilitarianism, which bases…known or stipulated.”

Utilitarianism, which bases punishment on the forward-looking goal of preventing future crime, is not only a justificatory theory explaining why criminal punishment should exist, but also a prescriptive theory explaining how punishment institutions should work. The utilitarian agenda encompasses both the purposes and the practices of the criminal justice system, seeking in all cases and at all stages of the process to minimize or prevent social harms (in the most cost-effective way).6 Because its project aims to specify both the content of criminal law and the proper means for enforcing that law, utilitarianism is not only a theory of punishment, but a complete theory of criminal justice.7

By contrast, retributivism, which adopts a backward-looking perspective focusing on the moral duty to punish past wrongdoing, is a justificatory theory, but seemingly not a prescriptive one.8 It offers retribution as a justifying ideal but does not explain how legal institutions are supposed to make retribution real.9 To the extent retributivism offers guidance about its own operation in practice, it speaks only to the content of criminal law rules, and not [speak to the] to their implementation [of criminal law rules].10 Retributive principles may identify what the law should criminalize,11 and might even say something about the proper idealized level of punishment for those crimes relative to each other.12 As to matters of application, however, retributivists tend to focus only on the resolution of individual (often hypothetical) cases where an offender’s behavior is known or stipulated.13

Moore149 and indicates the appeal or even necessity of adopting a consequentialist perspective in the face of inevitable resource constraints.

# 

# \*\*FRONTLINES FOR T\*\*

## A2 RETRIBUTION IS JUST DESERTS

#### The distinction is arbitrary – all kinds of punishment theory can support punishment of the guilty.

Brooks 13 [Brooks, Thomas (2013). Beyond Retribution. Think forthcoming.]

Retribution is also widely misunderstood. Its central ideas are that a person must be guilty in ¶ order to be punished and that punishment is set in proportion[al] to the gravity of the crime. ¶ These ideas are [is] not unique to retribution. Proponents of the rehabilitation of offenders ¶ likewise endorse the ideas of desert and proportionality: rehabilitation is only justified where ¶ a person has been convicted for a crime and there is a proportional link between crime and ¶ treatment here as well. Similarly, deterrence theories often stipulate the need for a person to ¶ be convicted for a crime prior to sentencing. This is because the punishment of innocent ¶ people in order to deter would be offenders would be self-defeating. One reason is because ¶ potential offenders might not be deterred if they learned that there is no link between crimes ¶ and their punishments: for deterrence to work most effectively, potential criminals must ¶ foresee the likelihood of their conviction and imprisonment from criminal activity. Similarly, deterrence also links the proportional gravity of crimes with punishments. Retribution, ¶ rehabilitation, and deterrence are three different approaches to punishment, but each includes ¶ the idea that criminals must be convicted prior to punishment and punishments should be set ¶ in proportion to crimes. There is nothing especially unique about the ideas of desert and ¶ proportionality for retribution. Alternative theories about punishment may incorporate these ¶ ideas, too.2¶ There is also nothing special about the kinds and range of punishments that retribution might ¶ justify. For example, retribution is not the only view that might claim a criminal should be ¶ sentenced to death for a crime. Likewise, other views can make the same claims: deterrence ¶ proponents might argue that execution is warranted and proportional on the grounds of ¶ supporting general deterrence, for example. Therefore, the kinds and range of punishments ¶ that retribution may justify are not unique to it either and open to endorsement by alternative ¶ penal theories, too. If the appeal of retribution is thought to lie in its more “harsh” ¶ punishments, then we can now see that this difference is illusory. Retribution does not ¶ endorse any unique range of punishments. Nor is it alone open to endorsing the most severe ¶ punishments, such as the death. While there is ¶ nothing special about retribution endorsing some view of desert and proportionality, there is ¶ something special and troubling about how retribution understands their value. Retribution ¶ offers a moral view of crime and punishment. We possess punishable desert where we ¶ perform some deep moral wrong and this wrong is criminal: the more immoral our criminal ¶ act, the more severe our retributivist punishment. This view of crime and punishment has broad appeal: it can be thought to “give criminals what they deserve” but this view suffers ¶ from two major problems.

## A2 DESERTS 🡪 HARSHER POLICIES

### CONSTITUTION IGNORES PROPORTIONALITY

#### The US Constitution and current harsh laws have no basis in retribution – they explicitly violate proportionality and use harsher punishments.

Whitman 03 [James Q. Whitman. Yale Law School. “A Plea against Retributivism.” Buffalo Criminal Law Review, Vol. 7, No. 1 (April 2003), pp. 85-107.]

Let me begin with the first worry. How much impact can thoughtful retributivist contemporary America? Does our philosophy have any direct bearing on what is going on? Most especially, does the doctrine of proportionality, as our philosophers develop it, make any difference? We all know the answer, at least in its simplest form. As a matter of constitutional law, our philosophy [retribution] makes no difference whatsoever. The Supreme Court reminded us of this, with awful clarity, only a few months ago. The decision in question is of course Ewing v. California,which upheld a twenty-five year sentence for a shop-lifting conviction. For those who think that the principle of proportionality ought evidently to place some limit on such a sentence, the Court explained the state of play in American law: Throughout the States, legislatures enacting three strikes laws made a deliberate policy choice that individuals who have repeatedly engaged in serious or violent criminal behavior, and whose conduct has not been deterred by more conventional approaches to punishment, must be isolated from society in order to protect the public safety.... Our traditional deference to legislative policy choices finds a corollary in the principle that the Constitution "does not mandate adoption of any one penological theory."... A sentence can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation.... Some or all of these justifications may play a role in a State's sentencing scheme. Selecting the sentencing rationales is generally a policy choice to be made by state legislatures, not federal courts.

### LEADS TO LESS HARSH POLICIES

#### Empirically, states that embrace retributivism have less harsh punishments.

Banks 04 [Cyndi Banks Prof of Criminology at Northern Arizona University 2004. “The Purpose of Criminal Punishment” ETHICS AND THE CRIMINAL JUSTICE SYSTEM. 2004]

Some critics argue that just deserts theory leads to harsher penalties, but von Hirsch (1998: 672) contends that the theory itself does¶ not call for harsher penalties, and that sentencing schemes relying specifically on just deserts¶ theory tend not to be severe. He draws attention to sentencing guidelines in Minnesota and¶ Oregon that provide for modest penalties by¶ U.S. standards. The Minnesota Sentencing¶ Guidelines provide a grid with a horizontal¶ axis showing previous convictions and a¶ vertical axis showing offense type (Hudson 1996: 44). The sentencing judge is required to¶ locate the appropriate cell on the grid for the¶ offender being sentenced, where the severity of¶ the offense and the number of previous convictions intersect. Each cell stipulates a presumptive prison term that represents the normal¶ period of incarceration for a standard case of¶ that offense. In addition to the presumptive¶ sentence, there is a band indicating the range¶ that should apply in the actual case. For¶ example, in the case of an aggravated burglary,¶ where the offender has three previous convictions, there is a presumptive term of 49 months¶ and a range of 45 to 53 months. The actual¶ sentence depends on aggravating and mitigating factors. According to Hudson (1996: 45),¶ sentencing guidelines have had the effect of¶ reinforcing relatively lenient punishments in¶ states with that [the just deserts] tradition, although states with¶ a history of imposing severe punishments, such¶ as New Mexico and Indiana, have produced¶ severe schedules and guidelines.¶

#### Prefer this interpretation:

#### Empirical verification: My evidence provides real-world checks to claims made by their authors, meaning the debate on accuracy is over – real world checks always account for various other factors, so they always beat back unchecked claims.

#### My evidence cites specific state policies, rather than vague claims about sentencing guidelines in the US, so it’s a more accurate assessment of real-world policies.

### SQUO IS NOT RETRIBUTION

#### Deterrence theory falls under util, status quo policies are better explained by util than retributivism.

Gruber 10[Aya Gruber University of Iowa. 2010. "A Distributive Theory of Criminal Law.” <http://works.bepress.com/cgi/viewcontent.cgi?article=1003&context=aya_gruber>. AJ]

Utilitarian penal discourse premises punishment on the production of a beneficial state of affairs, namely security against crime, 80 and generally focuses on three main theories: Deterrence, incapacitation, and rehabilitation. 81 Utilitarianism [it] is considered at odds with retributivism because it sacrifices the a priori principle of desert to a posteriori considerations of utility. 82 Rehabilitation, which purports to produce utility by reforming criminals, is currently unpopular, 83 having been rejected as welfarist 84 and insufficiently retributive because it confers “benefits” on criminals. 85 Thus, for several decades, deterrence has been the most visible utilitarian justification, with incapacitation recently coming into vogue. 86 Today, it is common to encounter arguments characterizing certain criminals as “undeterrable” and calling for permanent incapacitation. 87 Critics advance many arguments against penal utilitarianism, for example, that deterrence theory makes false assumptions about the actual psychology of potential offenders. 88 Despite a plethora of critiques, utilitarianism thrives. 89 Its adherents, like retributivists, use utilitarianism to explain existing criminal law elements. They describe the mens rea requirement as recognizing that unintentional harmers are not dangerous and cannot be deterred from doing that which they never intended. 90 Actus reus reflects the view that it is inefficient to sanction individuals who have chosen not to harm. 91

## A2 RETRIBUTION = GET TOUGH ON CRIME/DEATH PENALTY

#### Characterizing retributive punishment as “harsh” fundamentally misunderstands the philosophy. No one would say utilitarianism is definitionally harsh just because some bad dictators have used utilitarian justifications for genocide. Retribution just specifies *why* we punish, not how we punish.

Leo Zaibert in 2006 “Punishment And Retribution (Law, Justice and Power).” Ashgate Publishing Company. March 2006. [Philosophy Professor at the University of Wisconsin-Parkside]. DT.

I would like to continue the discussion of the misinterpretations of retributivism by¶ addressing one of the most dangerous and pervasive mischaracterizations of¶ retributivism. Retributivism is frequently [dangerously] confused, inside and outside academia,¶ with an endorsement of lex talionis, that is, with the view encapsulated in the¶ slogan an eye for an eye. a tooth for a tooth. One unwelcome manifestation of this¶ confusion is, for example, the widespread but false belief that retributivists¶ perforce must endorse the death penalty for murderers. But, as Moore points out,¶ this is rather gratuitous, and indeed baseless. To claim both that someone should¶ only be punished if she deserves it, and that if she deserves to be punished then she¶ should be punished, is in no way to say how much she deserves to suffer. As Moore would have it, retributivists “are not committed to any particular penalty scheme nor¶ to any particular penalty as being deserved”." This amalgam of retributivism and lex¶ talionis is perhaps Kant’s most pernicious legacy, from which Moore sensibly distances himself. 26 And, as [a] Moore continues, “separate argument is needed to answer these ‘how much’ and ‘what type’ questions [which lax talionis seeks to¶ answer], after one has described why one is punishing at all”.” A retributivist might¶ endorse lex talionis (just as utilitarians might), but she need not endorse it.¶

The tendency to equate retributivism with lex talionis is in fact but one¶ offshoot of a more comprehensive worry: that retributivism is too harsh.” The way¶ in which this particular manifestation of the comprehensive worry plays out is clear¶ enough: lex talionis is allegedly very harsh, and by equating it with retributivism,¶ the conclusion that retributivism is very harsh is easy to generate. There is plenty¶ of evidence of the fact that lex talionis was never meant to be interpreted or applied¶ literally; or as Kleinig puts it “it is difﬁcult to ﬁnd "proponents of a lax talionis doctrine who have taken it literally". 29 It is rather obvious, in any event, that there¶ exist many cases in which lax talionis simply cannot be applied literally.”¶ Moreover, lex talionis encapsulates, simultaneously, a lower and an upper limit to¶ what can be justifiable by way of punishment. Lax talionis thus cuts both ways, and¶ to that extent it is not easy to assert that it is necessarily, always unduly harsh.¶

While lex talionis can be seen in a charitable light, that is, as an incipient (albeit clumsy) attempt to say that there must be proportionality between the harm and the punishment (you cannot take an eye when the harm amounted merely to a tooth, and so on), it is obvious that such a view is different from retributivism. Retributivism does not say anything about what constitutes a proportional punishment for any given instance of wrongdoing. Rather than defending lex talionis, and in spite of its obvious differences with retributivism, I would like to discuss the underlying worry regarding retributivism being too harsh.

Retributivism has been equated, or considered to be the cause, or considered to be closely linked, to all sorts of “harsh” political agendas, such as “tough-on-crime”, “two strikes and you are out”, “law and order”, penalizing recidivist criminals more severely than non-recidivist criminals, and so on, which seek to¶ over-criminalize and to over-punish." “When you play the game of criminal justice¶ on the ﬁeld of retribution", Braithwaite and Pettit tell us, “you play it on the home¶ ground of conservative law-and-order politicians”; and they continue “you give full¶ rein to those who play to the sense of normality of the majority, urging them to¶ tyrannize the minority”? But as is the case regarding the alleged, though entirely¶ unargued for, theoretical proximity between lex talionis and retributivism, these¶ political agendas are not necessarily related to retributivism (as a philosophical¶ doctrine) either. A retributivist might endorse some of these views, though she might not, no more than would a consequentialist thinker. These sorts of views with which retributivism is frequently confused, are in fact, easily shown not to be retributive at¶ all. It is precisely the fact that the deﬁnitions of retributivism presented at the outset¶ are so straightforward which staves off this mistaken amalgamation of retributivism,¶ as a philosophical doctrine, with these political agendas.¶

## A2 RETRIBUTIVISTS CAN CARE ABOUT ENDS

#### While consequences can give additional reasons to value punishment, desert is still a necessary condition of punishment – their view just gives them additional burdens.

Otterstrom 07 [GÖRAN DUUS-OTTERSTRÖM. Punishment and Personal Responsibility. DEPARTMENT OF POLITICAL SCIENCE. GÖTEBORG UNIVERSITY. 2007. <http://www.utbildning.gu.se/digitalAssets/1316/1316460_avhandling_gdo.pdf>. AJ]

It should be clear that retributivism differs from utilitarian theories of punishment in a number of respects. As we have seen, utilitarians are committed to the belief that punishment is justified if and only if its positive effects outweigh its negative ones. Its general justifying aim is its capacity to produce utility, for instance by deterring crime or rehabilitat- ing offenders. Retributivism on the other hand [it] holds that justified punishment is justified irrespective of its consequences, though modern re- tributivists tend to see beneficial consequences of punishment (such as deterrence) as welcome side-effects (see e.g. Armstrong 1961; Corlett 2001). Punishing someone who deserves it is justified in itself. Desert is [still] a necessary and sufficient condition for justified punishment.

## A2 RETRIB = IGNORE MITIGATING CIRCUMSTANCES

#### This objection misses the point – desert theory says mitigating circumstances affect culpability, so mitigating circumstances would reduce punishment.

Otterstrom 07 [GÖRAN DUUS-OTTERSTRÖM. Punishment and Personal Responsibility. DEPARTMENT OF POLITICAL SCIENCE. GÖTEBORG UNIVERSITY. 2007. <http://www.utbildning.gu.se/digitalAssets/1316/1316460_avhandling_gdo.pdf>. AJ]

Those who believe that retributivism entails unacceptable legalism usually present a case along the following lines. Suppose two shoplifters: on the one hand an impoverished woman who steals food in order to feed her starving children, and on the other hand an affluent cheap-skate who simply cannot be bothered to pay for his groceries. Both break a legitimate rule. But the circumstances of their actions are clearly different – and a standard objection is that retributivism cannot account for this fact. Instead, the theory recommends that the woman and the cheap- skate should both be punished, and, if they stole similar things, be pun- ished equally hard. But this kind of stern and even-handed justice is unac- ceptable, the objection continues. There are mitigating, if not exonerating circumstances in the case of the impoverished woman which are not pre- sent in cases where people steal out of sheer greed.¶ This certainly seems right. But it misses completely the mark as an objection to retributivism. Those who present cases such as this have completely missed the foundational importance of desert to retributivism. Recall that the theory states that punishment is justified if, when and to the extent that it is morally deserved. Given that the mother and the cheapskate are not equally at fault, which seems plausible, the theory simply requires that we treat the mother more leniently than the cheap- skate. She deserves a lesser punishment; in fact she presumably deserves no punishment at all. For similar reasons it is incorrect to say that a retributivist is committed to the legalistic view that all crimes are to be punished, regardless of the nature of the laws. Consider a society which consistently permits morally vicious and outlaws morally virtuous be- haviour. In such a society, a coherent retributivist will conclude that no- one should be punished.101 More realistically, no coherent retributivist would consider, e.g., dissidence in an apartheid-state to be deserving of punishment.¶

## A2 CONSEQUENTIALIST RETRIBUTIVISM

### SAME CONCLUSION

#### Consequentialist retributivism still leads to the same conclusion in that it values desert for its own sake as something to maximize without taking into account any other good ends. Desert is still the primary focus so the neg T concludes my way.

Michael Cahill. Retributive Justice in the Real World. Washington University Law Review, Vol. 85, p. 815, 2007; Brooklyn Law School Legal Studies Paper No. 77. DT.

A third option abandons the agent-relative view of moral duties and adopts an agent-neutral understanding. On this account, the nature of the moral call for desert-based punishment does not demand punishment of each individual offender but rather [Consequentialist retributivism] sets the goal of maximizing the total amount of desert-based punishment,54 even if this means sacrificing deserved punishment in some cases for the sake of pursuing it in others. Because this approach interprets desert-based punishment as a “good” to maximize, rather than an ex ante and inviolate command, it has been described as consequentialist (as opposed to deontological) retributivism,55 which this Article will sometimes abbreviate as “CR.”

Significantly, the CR perspective does not merely seek to find room for retribution as one component of a standard consequentialist scheme, as some defenses of desert-based punishment do, for those accounts defend the practice as instrumentally valuable insofar as it generates other good consequences (such as making people happy or preventing crime).56 The CR account holds that imposing deserved punishment is itself an intrinsically good and valuable outcome, regardless of whether any other positive consequences attend it.

### TOPIC LIT

#### My interpretation is more prevalent in the literature – ZERO authors support it explicitly and only ONE author has adopted some form of it.

Michael Cahill. Retributive Justice in the Real World. Washington University Law Review, Vol. 85, p. 815, 2007; Brooklyn Law School Legal Studies Paper No. 77. DT.

The CR approach has been noted in the literature but never explicitly embraced. For example, Michael Moore has alluded to the possibility of consequentialist retributivism, though without subscribing to that approach himself.57 Dan Markel may be the only self-described retributivist whose elaboration of a retributive commitment adopts a CR perspective. Markel views retribution as “worthwhile in itself,”58 but also recognizes that punishment institutions cannot be “indifferen[t] to the consequences and costs of punishment.”59 As a result, he aligns himself with the fundamental CR conception of retribution as a goal to be pursued subject to real-world constraints, rather than as a binding moral duty:

#### He continues:

Michael Cahill. Retributive Justice in the Real World. Washington University Law Review, Vol. 85, p. 815, 2007; Brooklyn Law School Legal Studies Paper No. 77. DT.

As noted earlier, however, despite its powerful intuitive appeal as a strategy for achieving retributive goals in practice, the CR approach has, thus far, apparently found no adherents in the academic literature.142 Indeed, only two commentators seem to have discussed the idea at any length: Michael Moore has described the possibility of CR,143 though without embracing the approach himself;144 and David Dolinko, responding to Moore, has [one of them] offered a critique of CR.145 Interestingly, though, Moore’s most recent work appears to support a version of CR for some aspects of the criminal justice system, noting that consequentialist concerns can (and indeed must146) guide “those who design the general shape of legal institutions,”147 even as binding agent-relative obligations should continue to apply to individual actors within those institutions.148 Though clearly not a total embrace of CR, this marks a significant shift for Moore149 and indicates the appeal or even necessity of adopting a consequentialist perspective in the face of inevitable resource constraints.

## A2 GRAMMATICAL STUFF

### A2 VALUE = POLICIES (EMMONS AND NUTT)

#### The evidence says values express what is preferable – the small text has examples like freedom. That means philosophical stances like retributivism are consistent with this definition. Values can obviously inform actions but that doesn’t mean that they *entail* policies.

#### Prefer evidence about rehab and retribution since a question of values is dependent on what we are valuing to begin with. Valuing a policy is different from valuing a theory of punishment, so the aff argument begs the question.

## A2 TARGETS CAUSES OF CRIME

#### Rehabilitation focuses on fixing the individual, whereas fixing social conditions is compatible with any aim of punishment view.

Otterstrom 07 [GÖRAN DUUS-OTTERSTRÖM. Punishment and Personal Responsibility. DEPARTMENT OF POLITICAL SCIENCE. GÖTEBORG UNIVERSITY. 2007. <http://www.utbildning.gu.se/digitalAssets/1316/1316460_avhandling_gdo.pdf>. AJ]

It is important to note that rehabilitation entails a solid focus on the individual rule breaker. It does not focus on the structure of society as such. Thus, to say, as many contemporary politicians have said, that criminal policy should aim at eradicating the causes of crime – under- stood as, say, [such as] poverty, poor education, [and] drug abuse, etc. – is not to advocate rehabilitation. All theories of punishment treated in this chapter are compatible with, say, fighting poverty in order to prevent crime. Rehabilitation is instead normally understood as intervening, with or without consent, in the life of a rule breaker in order to restore him or her to some state of “normal” or desired functioning.88 This entails a preoccupation with the individual offender, not social background conditions, although it of course may be the case that the crime-causing problems have social origins (such as in cases where socio-economic deprivation is believed to produce anti-social personalities).

## A2 INSTITUTIONAL DESERT – RETRIB IS PRE-INSTITUTIONAL

#### Retributivism cannot be justified by existing laws – rather, it says that we ought to punish people sine that action is morally wrong.

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Unlike institutional desert, pre-institutional desert is a fundamental moral concept, which is logically prior to any given institution. We could therefore ask for any given institutions or body of rule whether it is in line with pre-institutional desert or not – a question which is nonsensical if desert is taken to be derivative of the institutional framework. For in- stance, in a pre-institutional sense of desert we could say that team B de- served to win even though team A scored one more goal than B without cheating (for instance because B played better football or tried harder). This amounts to the claim that the institutional rules of football do not always treat agents in accordance with their (pre-institutional) desert.¶ Retributivism as a rule understands desert preinstitutionally.95 Crime should be punished since/if it is wrong, not because it is a consequence of a particular penal scheme. It is for instance possible to say, according to retributivism, that a legally permitted act ought to be punished since it is morally wrong, which boils down to the claim that the act in a pre-institutional sense deserves punishment.

## RETRIBUTIVISM IS NOT UITL

Otterstrom 07 [GÖRAN DUUS-OTTERSTRÖM. Punishment and Personal Responsibility. DEPARTMENT OF POLITICAL SCIENCE. GÖTEBORG UNIVERSITY. 2007. <http://www.utbildning.gu.se/digitalAssets/1316/1316460_avhandling_gdo.pdf>. AJ]

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